BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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SUMMARY*

As stated in its Comments, SBC's only disagreement with the Commission in this proceeding relates to the means to the end, not the end in itself. SBC supports the goal of full and fair telecommunications competition. But the Commission must recognize that the industry was built to meet far different goals. Today's industry is built on ubiquitous network deployment, guaranteed high service quality levels, and price subsidies. This industry must evolve to fully competitive markets, a national "network of networks," and economically efficient prices. Comparing these two scenarios, it is easy to see that the only way to get from here to there is through a natural transition, not a mandated flash cut.

Over 170 parties filed comments in this proceeding, many of whom took different positions on most of the 415 questions raised in the NPRM. This fact alone should be enough to convince anyone of the Congressional wisdom in choosing to nurture increased telecommunications competition via a voluntary, private party negotiation process rather than a rigid regulatory approach. With this much variance in the needs and desires of carriers vis-a-vis one another, it would not be possible for any regulator to establish a set of rules that could even come close to fitting everyone's requirements. The specific terms of interconnection between new entrants and ILECs should be left to the voluntary negotiations of those parties, as Congress plainly intended. SBC urges the Commission to follow Congress's direction and enter the new era of facilitative regulation, leaving the anachronistic comprehensive regulation of days gone by where it belongs -- in the history books.

Most parties concurred with the Commission's tentative conclusion that, initially, the only unbundled network elements required to stimulate local exchange competition are the loop, switching,

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[1] Abbreviations used herein are referenced within the text.

local transport, and access to signaling and databases. Most importantly, a great number of parties strongly agreed with the Commission's tentative conclusion that IXCs and other carriers should not be permitted to use unbundled ILEC network elements to arbitrage the current federal access charge regime, thereby destroying a critical system of universal service support.

Although many propose different methods of calculating discounts for services subject to resale, the Commission must follow the formula prescribed by Congress, i.e., retail price less only actually avoided costs. Likewise, the Commission should not be misguided into requiring resale of anything other than telecommunications services that carriers currently provide at retail to subscribers. Neither should the Commission require resale on anything other than the terms and conditions under which those services are currently offered.

In interpreting the term "technically feasible" under the Act, the Commission should carefully account for the ILECs' current network technology, as well as the practicalities and economic realities involved with requests for interconnection or unbundling. USTA's Bona Fide Request process would be an excellent means by which to address future requests.

As with nearly all other matters covered by the Act, the pricing for interconnection and network elements should be left to the good faith negotiations of the carriers in the first instance, and to the state arbitration process where negotiation fails to produce a result. There is no area affected by the Act that is more important. Where a regulator does step in to resolve a pricing issue, it must adhere to the principles spelled out within the Act and ensure that the ILEC recovers all relevant costs. Otherwise, aside from the obvious inequity to the ILEC, the regulator would be risking the ILEC's ability to continue to serve effectively as the carrier-of-last-resort to the potential detriment of many consumers.

In particular, the Commission should be certain not to interfere with the calculation of compensation for termination and transport that was so carefully designed by Congress. Neither federal nor state commissions are empowered under the Act to require bill-and-keep or any other intercarrier compensation arrangement that is not the result of negotiation and that is not based on a reasonable approximation of the differences in cost as between the two carriers.

The Commission should re-evaluate its jurisdictional boundaries under the Communications Act, as amended by the 1996 Act, to ensure that it does not encroach upon the lawful jurisdiction of the states. The state commissions (and many other parties, including SBC) have stressed how important it is for the Commission to avoid an over-expansive view of its authority under the new Act. Unless the Commission appropriately moderates its tentative conclusions, the legal battles that will surely ensue will paralyze, rather than energize, the industry's effort to attain the more competitive level that Congress clearly desires.

Although few areas of the Act call for the establishment of national standards as part of the Commission's implementation responsibilities, one area where federal guidelines are permissible and would be helpful is in the arbitration process. Specifically, the Commission could clarify that such proceedings be uniformly restricted to only the issues presented by the parties for resolution, and to only the negotiating parties themselves. Otherwise, the arbitration process will slow to a crawl rather than expediting competition as envisioned by Congress.

SBC supports the pro competitive goals of Congress and the Commission, but urges the Commission to adopt only regulations that will facilitate the voluntary carrier negotiation process intended by Congress and to avoid the type of comprehensive regulation that the Act was designed to end.

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REPLY COMMENTS OF
SBC COMMUNICATIONS INC.

SBC Communications Inc. (SBC) respectfully files these Reply Comments, on behalf of all its subsidiaries, in response to comments filed on May 16, 1996, concerning the Commission's April 19, 1996, Notice of Proposed Rulemaking (FCC 96-182) (NPRM) on implementing certain provisions of the Telecommunications Act of 1996.[1] Because SBC has subsidiaries both in the position of an incumbent local exchange carrier (ILEC) and that of a "requesting telecommunications provider" (local service provider, or LSP), its Comments and these Reply Comments urge an appropriate balance in the Commission's implementing regulations.[2] This balanced approach is critical to the Congressional goal of widespread competition on the merits in the United States.

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[1] Pub.L.No. 104-104, 110 Stat. 56 (1996 Act or Act).

[2] Southwestern Bell Telephone Company (SWBT), a wholly-owned subsidiary of SBC, is an ILEC and a Bell Operating Company (BOC) under the Act. SBC has other subsidiaries that are commencing local exchange service operations as LSPs outside of SWBT's five-state territory (Arkansas, Kansas, Missouri, Oklahoma, and Texas).

I. INTRODUCTION (NPRM - II.A. & II.B.1.)

In its Comments, SBC explained the propriety and importance of minimizing, to the greatest degree possible, the level of regulation asserted in implementing the 1996 Act.[3] The legislative history and the language of the Act itself plainly show that Congress desires local service competition to develop through the voluntary carrier negotiation process -- as motivated by specific incentives carefully built into the Act -- not through a traditional, comprehensive regulatory approach.[4]

The Commission does not have to speculate regarding whether the powerful business incentives incorporated within the Act will be effective in encouraging ILECs to interconnect their networks with those of new market entrants in a pro-competitive manner. In less than four months since the Act became law, several Bell operating companies (BOCs), which collectively serve over 75 percent of the nation's local exchange customers, have already announced interconnection agreements with LSPs.[5] Southwestern Bell Telephone Company (SWBT), a wholly-owned subsidiary of SBC, became the first BOC to sign an interconnection agreement negotiated fully under the Act on May 9, 1996, only three months after enactment. Requiring BOCs to enter into such agreements pursuant to negotiation in order to receive authority to enter the in-region interLATA and manufacturing businesses (47 U.S.C. § 271(c)) has already proved to be compelling motivation.

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[3] SBC, pp. 5-21. SBC cannot fully respond to over 15,000 pages of comments filed by over 170 parties in just two weeks with a 50-page limit, and notes for the record its due process concern.

[4] Conference Report 104-458 on S.652, 104th Congress, 2d Session, February 1, 1996, at 1 (Conference Report); 47 U.S.C. §§ 251, 252, 271 and 273.

[5] See May 16, 1996 USTA News Release ("As evidence that the voluntary negotiation process is working, USTA cited more than 50 signed agreements with companies seeking interconnection to the local network and nearly 400 negotiations underway").

Many commenting parties agree that a minimal regulatory approach is what Congress intended for the Commission in this instance, and that such an approach is the optimal way to facilitate attainment of the Act's bedrock pro-competitive goals.[6] This is especially true of the legislatively mandated interconnection negotiation process that is the very heart of the Act. (47 U.S.C. § 252) Numerous parties agree with SBC that the Commission should not place tight parameters around the negotiation process, such as establishing the "boundaries" of acceptable results on specified issues.[7] That approach would only limit the creativity of the negotiating parties, thereby impeding their ability to reach an accord.

Furthermore, such an approach could undermine the entire industry negotiation effort by removing the incentive to negotiate and replacing it with a set of FCC "national standards" that many parties would point to as non-negotiable "law." The plain language of the Act shows that this result would be directly contrary to the will of Congress. The first duty of all ILECs listed in § 251 is "to negotiate in good faith in accordance with [this Section] the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection."[8]

Certain parties argue erroneously that detailed Commission rules and guidelines are necessary, both with regard to general implementation of the Act and regarding carrier

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[6] Ameritech, pp. 5-7; Bell Atlantic, pp. 1-4; BellSouth, p. 3; GTE, pp. 5-6; Iowa Utilities Board, pp. 5-7; Michigan Exchange Carriers Assoc., pp. 12-15; New England Telephone, pp. 2-3; NYNEX, pp. 1-3; SBC, pp. 5-16; USTA, pp. 5-8.

[7] Ameritech, pp. 4-9; Bell Atlantic, p. 3; BellSouth, p. 3; New York Dept. of Public Services, pp. 9-11; Pacific, p. 3; Public Utility Comm. of Ohio, pp. 7-8; Southern New England Telephone, pp. 2-6; USTA, p. 6.

[8] 47 U.S.C. § 251(c)(1) (emphasis added). All requesting telecommunications carriers have a corresponding duty. Id.

negotiations in particular,[9] but t heir arguments do not stand up to the facts. For example, AT&T asserts that explicit federal st ndards are essential to force ILECs to enter into interconnection agreements and open local ma kets, and predicts, incorrectly, that otherwise negotiations called for under the Act "will be exe cises in futility." (AT&T, p. 7) As explained above and in SBC's Comments (SBC, p. 11), sev ral BOCs have already entered into such agreements -- either in anticipation of or as a direct r sult of the 1996 Act -- and several others reportedly are close to announcing similar agreements NYNEX has entered into such agreements with MFS, TCG and Brooks Fiber.[10] BellSouth h s such agreements with GTE, MCI, MFS and Sprint. Ameritech is interconnected with dial-tone competitors in all five of its states. (Ameritech, p. 3) Pacific Bell has negotiated agreements wit h MFS, TCG, Brooks Fiber, Pac-West Telecom, and ICG Access Services. (Pacific, p. 6) Bel Atlantic and U S West have also entered into such agreements. Contrary to AT&T's claim, in ustry efforts to negotiate satisfactory interconnection agreements have been anything but futile.

Other parties assert tha carriers wishing to purchase network elements and combine them with their own network compo nents in multiple states must have a "single regulatory framework applicable in all states." (C mpTel, p. 20) Certain technical standards need to exist on a nationwide basis (and, as SBC demonstrated in its Comments, they already do) (SBC, pp. 29-31) to facilitate interconnection o multi-state LSPs with ILEC networks. But minor differences in state regulatory approaches from state to state -- particularly considering the Act's clear prohibition against unreasonab e barriers to entry (47 U.S.C. § 253) -- are not justifiably feared as supposed impediments to f rther competitive development. Section 256 requires all carriers to design and construct comp tible networks. (47 U.S.C. § 256) Moreover, a uniform national

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[9] See, e.g., AT&T, pp. 3- 1; DOJ, pp. 8-5; MCI, pp. 4-5.

[10] Telecommunications Re orts, Vol. 62, p. 14, January 8, 1996.

regulatory approach has never been necessary to facilitate interconnection, and differences in state regulatory approaches have existed for years without impeding competition.

Congress has made clear its desire that voluntary carrier negotiations motivated by specific business incentives should drive competitive development in the local exchange. The Commission should adopt only those regulations which help facilitate that goal, and should reject proposed regulations which could hamper or impede its implementation.

II. SPECIFIC INTERCONNECTION TERMS AND CONDITIONS SHOULD BE DETERMINED BY NEGOTIATION. (NPRM - II.B.1.)

SWBT is currently negotiating with over twenty LSPs. There are nearly as many different business plans as there are negotiating parties. No single national policy can accommodate each of these different plans. The invalidity of a "national standards" approach is further demonstrated by the breadth and variety of comments in this docket. Congress decided that this subject should be a matter of negotiation because it understood that every interconnector will have a unique perspective and a particular set of requirements. While some measure of commonality can be expected, there is no set number of variations. Attempting to mandate one, two, or even three methods of interconnection simply cannot address the full range of actual or potential requests or take the place of good faith negotiations. In sum, a single national policy would be both limiting and unhelpful in many respects.

The wisdom of specifying negotiated interconnection agreements instead of regulated interconnection mandates is borne out by experience. As explained in SBC's Comments, being required to provide and tariff physical collocation resulted in SWBT being unable to recover its costs in specific instances. (SBC, p. 65 n.134; p. 66 n.136) The modifications needed to provide physical collocation varied by central office, as did the costs of those modifications (especially with respect to non-affiliated contractor expenses). The actual demand for physical collocation (where

any existed at all), and its timing, varied by central office as well. Moreover, interconnectors have been less than satisfied with the inflexibility of the tariff approach for expanded interconnection. For example, one interconnector desired the use of a unique long-range laser which only required a change of one circuit pack. To provide that single modification, SWBT was required to file a new tariff to address the unique situation. The required tariff filing cost SWBT and the interconnector time and money. Ultimately, the interconnector never purchased the item.[11]

Since passage of the Act, inquiries about physical collocation have continued to reflect a great deal of variance among interconnectors' requests. The ability to negotiate an agreement to address a particular request for a certain central office allows a uniquely tailored arrangement that meets the requesting carrier's requirements and ensures ILEC recovery of actual costs and appropriate compensation for the taking of its property. Absent that ability, the same taking and just compensation issues that were raised in Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), would arise again.

Moreover, mandating interconnection requirements would not eliminate the need to negotiate an agreement that must ultimately be approved by a state commission under the Act. As in the case of the duty to unbundle (SBC, pp. 84-86), the duty to interconnect under § 251 (including physical collocation) is not common carriage.[12] Imposed by statute, the duty to interconnect is limited to requesting carriers only for the specific purpose of permitting the

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[11] Another example of such inefficiency is the tariffing of collocation equipment lists which led to tariffing many pieces of equipment that have never been ordered.

[12] See Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1480 (D.C. Cir. 1994) ("the primary *sine qua non* of common carriage is a quasi-public character, which arises out of the undertaking to carry for all people indifferently"). Under § 251(c)(6), an ILEC is required to provide physical collocation as a result of statutory compulsion, but then only to requesting carriers. There is no voluntary undertaking to provide such arrangements indifferently; only a requirement to provide physical collocation to a statutorily limited set of potential customers.

transmission and routing of local exchange service and exchange access (and not to provide telephone toll service). Accordingly, there is no justification for imposing a tariffing obligation on an ILEC for interconnection arrangements, including physical collocation, virtual collocation, and mid-span meets. Those commentors requesting that interconnection arrangements be tariffed ignore both the law and the clear Congressional intent. Interconnection arrangements are to be a matter of good faith negotiation under the Act's umbrella, not a matter for regulatory imposition.

Many commenting parties imply that § 251(c)(6) authorizes the Commission to mandate whatever they may request, so long as it is labeled "physical collocation" or "virtual collocation." Those parties are wrong. As explained in SBC's Comments, Congress adopted a term that cannot legally be stretched beyond its existing Commission-defined limits. Requiring an ILEC to accept any type of equipment that a requesting carrier wishes in a physical collocation space[13] would ignore not only the Commission's existing basic transmission equipment limitation but also the express statutory limitation that physical collocation is only required for "necessary" equipment. Congress did not authorize any broader taking of ILEC property.

For the same reason, the Act does not authorize a requesting carrier to take as much space as it wishes;[14] instead, subject to negotiations, only the space that is necessary and available must be provided. Moreover, since physical collocation remains a taking of ILEC property, adopting suggestions that unused space be given to a requesting carrier free of charge (MFS, p. 31) would violate the Constitutional requirement that an ILEC receive just compensation for property taken. Neither is the Commission authorized to take ILEC property by requiring conversion of virtual collocation to physical collocation without charge or at a charge that does not fully compensate

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[13] AT&T, pp. 40-41; MFS p. 24.

[14] MFS, p. 34; TCG, pp. 32-33.

ILECs for the property taken and the cost incurred,[15] by requiring virtual collocation to be provided at the same charge as physical collocation when the latter is not available,[16] or by prohibiting ILECs from recovering the costs of providing collocation.[17]

Similarly, the Commission has not been empowered to authorize the invasion and modification of ILEC property by third-party contractors selected by requesting carriers in the case of virtual collocation.[18] The Act did not authorize the Commission to order virtual collocation at the option of the requesting carrier,[19] or to order ILECs to enter into $1 sale/repurchase agreements.[20] Finally, ILECs have no duty to provide collocator-to-collocator

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[15] TCG, p. 32 (virtual collocation charges credited against non-recurring charges for physical collocation and no charges for conversion); MCI, p. 53 (no charge for switching from virtual to physical).

[16] ALTS, Att. A, **.404(b), pp. 27-28. As the Commission is well aware, the attributes and associated costs of physical collocation in comparison to virtual collocation are vastly different.

[17] MCI (p. 57) and ALTS (Att. A,**.404(d), p.28) (both suggest that physical collocators be relieved of paying the costs that each causes for security measures and building services, e.g., power and air conditioning; each simply wants the ILEC to be required to absorb these costs).

[18] To one degree or another MCI, TCG, and ALTS request that the Commission require ILECs to permit requesting carriers to use vendors of their choosing to enter and modify ILEC property in virtual collocation situations (see nn. 15-17, supra). The Act requires the ILEC to provide "virtual collocation" as that term had been defined prior to passage, thus vesting the ILEC with that responsibility, not the requesting carrier. Although such requests could be the subject of negotiation, the Act does not authorize such an invasion. Inherent in physical collocation is the right of the collocating carrier to install, maintain, and repair collocated equipment (subject to applicable security and environmental provisions). However, if those requesting such abilities want the same rights with respect to virtual collocation arrangements, they ignore the use by Congress of "virtual collocation," another pre-existing, defined term. Nothing in the Act expanded the concept of virtual collocation so as to allow requesting carriers to exercise such rights of control over ILEC property.

[19] MCI, p. 53; AT&T pp. 40-41. Virtual collocation is only conditionally required when physical collocation cannot be provided 47 U.S.C. § 251(c)(6). Thus, an ILEC cannot be forced to provide virtual collocation when it can provide physical collocation.

[20] TimeWarner, p. 42; ALTS, pp. 48, 49.

cross-connects as MCI wishes. (MCI, pp. 53, 56) Both physical and virtual collocation are means by which requesting carriers interconnect with the ILEC, not with each other. SWBT offers no such service or connection to other collocators and has no duty to offer such arrangements under the Act.

III. INTEREXCHANGE CARRIERS MAY NOT USE UNBUNDLED NETWORK ELEMENTS TO ARBITRAGE ACCESS. (NPRM - II.B.2.)

SBC agrees with the Commission's interpretation of the Act[21] and with the parties[22] who support the Commission's tentative conclusion that carriers offering only interexchange service are not entitled to interconnection under § 251(c)(2) because they are not engaged in the provision of telephone exchange service or exchange access service.

The Act raises issues involving the interconnection of ILEC networks with a wide variety of industry participants. Entities which once could clearly be categorized as either an LSP, interexchange carrier (IXC), competitive access provider (CAP), enhanced service provider (ESP), or wireless service provider could, in the future, conceivably be offering services which would place them simultaneously within several or all of these categories. This situation, coupled with the fact that prices for unbundled network elements may not be allowed to provide the same level of support to universal service as today's access services (see infra, Section VII), makes it apparent that these telecommunications service providers have huge incentives to assume whatever form necessary to obtain the lowest possible rate.

Obviously, IXCs are interested in any access charge reductions they can obtain. They have attempted to persuade regulators to reduce access charges through their involvement in virtually

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[21] 47 U.S.C. § 251(c)(2); NPRM, paras. 159-161.

[22] Ameritech, pp. 17-21; Bell Atlantic, p. 9; BellSouth, p. 60; NYNEX, pp. 9-10; Pacific, pp. 78-80; MFS, pp. 40, 65; TimeWarner, pp. 66-70; TCG, pp. 40-41.

every proceeding dealing with that subject. IXCs have historically used service and facility bypass (including CAP facilities), and more recently collocation, and any existing unbundled rate elements to replace access service components in whole or in part. The IXCs' expressed desire to use unbundled network elements priced at cost, to substitute for access services is just another attempt to increase IXC profits without regard to the public interest.[23]

Inter- and intrastate Carrier Common Line (CCL) charges, which help to recover a portion of loop costs, amount to over $900 million annually for SWBT alone. IXCs would target customers with high long distance usage to serve with ILEC unbundled local loops and thereby avoid CCL charges. Likewise, IXCs would target some especially high usage ILEC switches for bypass in order to avoid the Residual Interconnection Charge (RIC) (over $200 million annually for SWBT) which is billed based on switched minutes of use (MOUs). IXCs would also provide some network components in conjunction with purchasing SWBT's unbundled network elements in high density areas to reduce their expenses, and simply continue to use SWBT's services in low density, high cost areas with low, zero or negative margins. These are just some examples of the arbitrage that would occur if the Commission does not affirm its tentative conclusion that terms of interconnection under § 251(c)(2) of the Act are only applicable to providers of exchange services, as Congress clearly intended.

The contrary position supported by IXCs[24] would also retard or eliminate facilities-based competition. If, as the IXCs suggest, the aggregate price (the sum of Total Service Long Run Incremental Cost -- TSLRIC) of all unbundled elements cannot equal or exceed the price of the ILECs' current access service, aggregate TSLRIC effectively becomes the price ceiling for all other market participants. The level of unbundling suggested by IXCs coupled with such self-

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[23] MCI, p. 28; Cable & Wireless, Inc., p. 30.

[24] MCI, p. 23; AT&T, p. 22; LDDS, p. 29.

serving pricing requirements would result in a windfall to IXCs, but would do nothing to promote telecommunications competition or the public interest.

LSPs are also concerned over the potential for such a result. For example, TimeWarner (pp. 66-70) and TCG (pp. 40-41) express concern that inappropriate Commission action on this issue will negate the Congressional intent for facilities-based competition. The fact that not only ILECs but CAPs (e.g., TCG) are concerned that the development of facilities-based competition would be stymied should be of particular significance to the Commission. CAPs have certainly proven capable of deploying their own facilities and are familiar with the incentives and disincentives for facilities-based competition.

Taken to its extreme the IXCs' proposal would permit them to purchase sufficient quantities of unbundled elements at TSLRIC to displace virtually every ILEC service to existing ILEC access customers. This could be accomplished with IXCs' costs being significantly less than they are today, but with IXC prices only marginally below the ILECs' retail service rates. Under the IXCs' proposal, IXCs and others would have no incentive to build out their own facilities to compete against ILECs as was envisioned by Congress in the Act.[25]

In this same area, MCI proposes to author its own amendment to the Act. (MCI, p. 83) Specifically, MCI asserts that the Commission may not grant § 271 interLATA freedom unless or until BOC access charges are reduced to cost, presumably TSLRIC. Section 271 does not require prices set equal to TSLRIC and such pricing is not economically feasible.[26] MCI's transparent attempt to reduce its ILEC access charges and inflate its profits should be rejected in favor of the

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[25] Further, it was not Congress's intent that LSPs be able to provide any finished service entirely through the use of an ILEC's unbundled network elements, without adding any network components of their own. To do so would undermine the Act's concept of resale of existing services.

[26] See SBC, pp. 88-93, and infra, Section VII. See also the Affidavit of Richard A. Epstein attached to Bell Atlantic's Reply Comments.

clear intent of Congress to stimulate facilities-based competition.

IV. RESALE MUST BE LIMITED TO ONLY TELECOMMUNICATIONS SERVICES SOLD AT RETAIL TO NON-TELECOMMUNICATIONS CARRIERS. (NPRM - II.B.3.)

Similar to other attempts to overextend the requirements of the Act, a number of commentors demand that every service sold by an ILEC be made available for resale at a discounted rate.[27] These parties essentially ask the Commission to stop reading § 251(c)(4)(A) after the words "duty to offer for resale at wholesale rates any telecommunications service that the carrier provides . . . ."[28] Congress, however, did not stop there, and neither can the analysis. An ILEC's duty is limited by the remainder of that Section: ". . . at retail to subscribers who are not telecommunications carriers." As set forth in the Comments of SBC and others, reading Section 251(c)(4)(A) in its entirety makes clear that wholesale services currently provided to carriers or others (e.g., switched access) need not be provided for resale at a discount.[29]

Section 252(d)(3) mandates a discounted price only with respect to those telecommunications services that must be provided by an ILEC in accordance with § 251(c)(4)(A). Otherwise, as at least one commentor has noted (MCI, p. 83), the wholesale price may equal the retail price under § 251(b)(1) since that section only imposes the duty not to prohibit resale upon LECs (as opposed to an ILEC's affirmative duty to offer for resale under § 251(c)(4)(A)). Commentors seek to avoid that straightforward reading of the two resale duties by having the Commission equate the language of § 251(c)(4)(A) with that of § 251(b)(1), and then tie the wholesale price standard of § 252(d)(3) to § 251(b)(1) for ILECs only. Doing so would violate

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[27] AT&T, pp. 75, 76; ACSI, p. 59; TRA, p. 24; MCI, p. 94; CompTel, p. 98; MFS, pp. 86, 70.

[28] 47 U.S.C. § 251(c)(4)(A) Some even want to skip over the word "telecommunications" so that any service sold by an ILEC must be made available for resale. See, e.g., TRA, p. 18; MCI, p. 86.

[29] SBC, pp. 68-69; Southern New England Telephone, pp. 31-33; U S West, pp. 64-67.

the Act by obliterating the distinctions and structure that Congress carefully created.

A. Telecommunications Services Provided At Retail Do Not Include Access Services Or Information Services. (NPRM - II.B.3.)

Certain commentors provided specific lists of services that they wish declared to fall within § 251(c)(4)(A). MCI, for example, provides a minimum list of services to be available for resale that includes voice messaging and public access line service. (MCI, p. 84) AT&T provides a similar list which includes special, dedicated and switched access services and public access line service. (AT&T, pp. 76-77) None of the cited services fall within the § 251(c)(4)(A) description of services subject to the Act's resale requirement. Voice messaging is an information service under the Act, which by definition cannot be a telecommunications service. The Act makes clear that "telecommunications" involves mere "transmission" of the user's choosing, without any change in form or content (47 U.S.C § 153(43)), whereas "information service" includes "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications...." (47 U.S.C. § 153(20) (emphasis added)) No resale obligation attaches to any information services (or to any enhanced services, which are defined quite similarly). (47 C.F.R. § 64.702(a)) Public access line service and access services are wholesale services, generally provided to carriers or aggregators for use as inputs into other telecommunications services provided to the public.[30] These are not "retail" services, and they are not subject to § 251(c)(4)(A) or to the associated pricing requirements of § 252(d)(3).

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[30] That end-users are sometimes able to purchase from access tariffs does not change the fact that access services were designed and are offered as wholesale services. Further, that ability was often created by regulatory order, not by ILEC decision. For example, in states where permitted, SWBT has prohibited non-carriers from purchasing switched access services. SWBT Ark. Access Service Tariff, Sec. 6.1; Mo. Access Service Tariff, P.S.C. Mo.-No. 36, Sec. 1.1.

B. Congress Reserved To The States The Authority To Determine The Reasonableness Of Resale Restrictions. (NPRM - II.B.3)

A number of commentors express the view that no restriction on resale can be allowed, other than the restriction on reselling services across categories of subscribers.[31] However, the plain language of the Act only prohibits "unreasonable or discriminatory conditions or limitations on the resale of . . . services." (47 U.S.C. §§ 251(b)(1) and (c)(4)(B)) Restrictions, limitations and conditions that are non-discriminatory and reasonable are permitted by the Act. For example, those conditions, limitations and restrictions that are present in existing intrastate tariffs have already been found by state commissions to be non-discriminatory and reasonable, and therefore can remain intact.

Furthermore, for IXCs to suggest that conditions and limitations on resale are not appropriate belies their position with regard to their own services.[32] While resale prohibitions are not permitted on interstate services IXCs commonly impose conditions and limitations on the use of their services which have the same effect. For example, MCI limits business customers of its Preferred service to 50 "1+ locations and residential customers to five sites per account. Similarly, AT&T limits customers of its Select Value service to five Type B "1+" sites. Sprint has numerous reseller-oriented conditions sprinkled throughout its high-usage service offerings.[33] Hence, even in markets determined by the Commission to be highly competitive, and where resale

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[31] MFS, p. 71. Even this restriction was narrowed by several commentors as applying only to the resale of residential services to business customers. DOJ, p. 54; Sprint, p. 71. Business customers and residential customers are just two categories of customers, however. SWBT provides services to ESPs, private payphone providers and CAPs, each of which is a different category of customer and each of which purchases from different SWBT tariffs.

[32] CompTel, p. 101; LDDS, p. 82; AT&T, p. 79; Sprint, p. 71.

[33] *Long Distance for Less Updates*, Dr. Robert Self, Vol. 9, No. 1, February 1996.

is thriving, conditions and limitations on service offerings are quite common.[34]

C. Certain Parties' Proposed Rules And Estimates Of Avoided Costs Are Misdirected And Premature. (NPRM - II.B.3.)

It is incomprehensible that so many commentors apparently believe that Congress was misguided in establishing negotiation as the means for determining the rates for resale services. Given the comments filed, these parties must believe that all negotiations will fail. SWBT, having already reached agreement with American Telco, Inc., and recognizing the other agreements that are close to being reached, is optimistic that a satisfactory agreement can be reached with any reseller or interconnector that is willing to negotiate in good faith.

Even if negotiations fail, the Act specifically delegates the responsibility to address any open issues exclusively to the states through the arbitration process. Only upon a failure of a state commission to act does the Commission have the authority to interpret and apply § 252. (47 U.S.C. § 252(e)(5))

In light of the Act's language, submitting estimates of avoided costs is premature, overbroad, and tendered in the wrong proceeding before the wrong forum.[35] Any argument that a reseller wishes to make about the establishment of resale rates under § 252(d)(3) should be made

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[34] TRA wants the best of both worlds. It argues that not only should special promotional offerings be available for resale, but that the conditions and limitations that apply to ILEC retail customers should not apply to resellers. TRA, p. 19. TRA mistakenly believes that the Act permits discrimination in favor of resellers.

[35] SBC will not repeat its positions on the appropriate method for determining avoided costs (see SBC, pp. 74-75 and Exhibit A). Rather, SBC points out how far prospective resellers have traveled from the actual language of the Act. Several commentors suggest that avoided costs include an allocation of joint and common costs -- costs that are clearly not avoided when a service is sold at wholesale rather than retail. LDDS, for example, argues that ILECs should be required to exclude all retail-related costs from wholesale rates, without regard to whether the cost is actually avoided (p. 86). MCI and CompTel argue for determining "costs that will be avoided" by acting as if the ILEC has wholly exited the retail market (Att. 2; pp. 96-98; and p. 86 respectively). Such positions are plainly in conflict with the Act and should be summarily rejected.

in the arbitration setting after negotiations have been attempted.

V. "TECHNICALLY FEASIBLE" MUST BE DEFINED TO PROPERLY ACCOUNT FOR AN ILEC'S CURRENT NETWORK TECHNOLOGY, AND MUST EMBODY PRACTICAL AND ECONOMIC REASONABLENESS. (NPRM - II.B.2.)

A narrow reading of the term "technically feasible" which excludes economic references is inconsistent with the 1996 Act (USTA, pp. 11-12), with the plain meaning of the term (Bell Atlantic, p. 16), and with Constitutionally-mandated rules of statutory construction.[36] Furthermore, the exclusion of other factors, such as economics, in the determination of feasibility would cause the Commission to act in an arbitrary and capricious manner by significantly deviating from its own recent decisions. In its 900 Service Order, the Commission stated: "In defining 'technically feasible,' we balance both technical and economic considerations with a view toward providing blocking capability to consumers without imposing undue economic burdens on the LECs."[37] Presumably Congress was aware of this FCC definition of the term "technically feasible" when Congress chose to use it in the 1996 Act.

There is some confusion within the industry regarding the proper definition of "technically feasible" points of interconnection and unbundled network elements. However, it is indefensible for commentors to suggest that the definition should be based solely on the technical "possibility"

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[36] As noted by U S West, the Commission must avoid any interpretation of the Act that would render it unconstitutional. U S West further explains that the Act does constitute a "taking" under the Fifth Amendment, and as such the Commission must ensure that all costs associated with interconnection and unbundling can be recovered by the ILECs. Thus, the Constitutionally mandated interpretation of the term "technical feasibility" must include economic considerations. U S West, pp. 24-35.

[37] Report and Order, Policies and Rules Concerning Interstate 900 Telecommunications Services, 6 FCC Rcd 6166, 6174 (199) (emphasis added).

of the requested connection or unbundling, without consideration of actual "feasibility."[38] As noted in SBC's Comments, 'technical possibilities" do not equate to technical feasibility.[39] "Technically feasible" must be interpreted to mean both technically possible and reasonable, where "possibility" is tempered by cost-benefit considerations. (Office of Ohio Consumer's Counsel (Part 1), p. 10)

The technical feasibility of a point of interconnection or an unbundled network element must take into consideration not only the physical or logical "unbundling" or separation of the network element, but also the technical feasibility of offering the interconnection or unbundled network element to the requesting carrier in a manner consistent with the goals of the Act. Both the ILEC and the requesting carrier must be able to order, provision, install, trouble-shoot, maintain, monitor, and bill for interconnection arrangements and access to unbundled network elements. The term "feasible" by definition includes only those elements that are "capable of being managed, utilized, or dealt with successfully."[40] Determinations of technical feasibility must consider each ILEC's network hardware and software arrangements as well as operational support systems which are critical to an ILEC's ability to provision, administer, manage and support the requested service arrangements. Contrary to the contention of some commenting parties (MCI, p. 12), any interpretation of the Act's "technically feasible" requirement that fails to consider the ability of both parties to actually use the capability for the offering of competitive local exchange service is inconsistent with the Act.

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[38] Sprint, p. 29; DOJ, p. 19 The Commission also implies use of the "possibility" standard in its proposed default rule for technical feasibility. NPRM, para. 57.

[39] SBC, pp. 25-27. Also see Nortel p. 4 n.6 (2 gigabit hard disks for personal computers have been technically possible for five years, but they have not been practical or economical).

[40] See Bell Atlantic, p. 16 citing Webster's Third New International Dictionary (1993).

USTA offered in its comments a set of guidelines and factors for evaluating whether a requested interconnection point or unbundled network element is technically feasible. (USTA, pp. 13-44) SBC supports those proposed guidelines. Adoption of USTA's feasibility guidelines would reflect the Commission's recognition that a number of factors must be considered to ensure proper application of the term 'technical feasibility," and that these considerations are extremely complex and highly technical.[41]

SBC supports the distinction between matters that are technically feasible today, and matters that may be technically feasible in the future. (Bell Atlantic, p. 15) SBC and other ILECs have proposed a minimum, workable and sufficient set of interconnection points and unbundled network elements that can be agreed upon by the industry today. Any further delineation of points of interconnection or unbundling should be considered based on a set of guidelines endorsed by the Commission for use in the context of negotiations as technology and the network continue to evolve.

In consideration of requests for future points of interconnection and unbundled network elements, SBC strongly supports the proposal of several commentors for a bona fide request (BFR) process.[42] USTA's BFR process considers and balances the needs of both requesting carriers and ILECs. Specifically, SBC supports several commentors' views that the BFR process

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[41] One switch manufacturer noted that "this current process to enhance competition parallels the implementation of equal access that occurred as a result of the divestiture of the Bell Operating Companies. That action required significant efforts and the full cooperation of all of the companies involved, including the establishment of industry committees and forums to address the myriad technical issues created by equal access implementation. Nortel likewise expects that this next phase of further opening up the local exchange carriers' networks will be equally complex, if not more so." Nortel, pp. 2-3. Also see Affidavit of Joseph H. Weber, attached.

[42] USTA, pp. 23-14. These guidelines were endorsed by many commentors. See, e.g., GTE, p. 19; Bell Atlantic, pp. 15-19; Cincinnati Bell Telephone, pp. 7-9; Pacific, pp. 16-21; U S West, pp. 40-42.

must place the financial burden and risk of providing the requested interconnection arrangement or unbundled network elements on the requesting party.[43] This financial risk should be borne by the requesting party in the form of a posted bond, a commitment for the specified number of access arrangements, or through a contractual "liquidated damages" clause. (BellSouth, pp. 17-18) SWBT, like Bell Atlantic has been placed in the position of having to expend considerable resources to provide "requested" network capabilities that were never used as requested.[44] The Commission should ensure that processes are established so that ILECs are not placed in the position of being uncompensated for their efforts in responding to requests made under the Act.[45]

Finally, SBC reiterates that the Act does not require the ILECs to alter their networks to create new points of interconnection or to unbundle network elements. (SBC, pp. 85-86) The purpose of the Act is not to dismantle ILEC networks or to cause an ILEC to rebuild its network. Congress intended to provide LSPs the means to use existing ILEC networks until their own

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[43] Bell Atlantic, p. 19; BellSouth, pp. 17-18.

[44] For example, SWBT was requested by one carrier several years ago to develop a Flexible Automatic Number Identification (ANI) capability. SWBT spent in excess of $15 million on the purchase of switch feature software based on continued requests from the carrier. However, after the capability was added to SWBT's local network, the carrier never purchased this access feature and the carrier did not reimburse SWBT for the expenditure. Similarly, in complying with its ONA obligations, SWBT has deployed a requested Basic Service Element (BSE) for which there has been virtually no demand. As another example, the Commission required LECs to provide equal access end office Feature Group D tandem signaling to Tandem Service Providers (TSPs) in its Third Report and Order in CC Docket No. 91-141, released May 27, 1994. The Commission denied petitions for reconsideration and waiver requests and ordered a tariff effective date of January 24, 1995. Bellcore created the necessary standards, and the LECs developed the service and filed the tariffs. To SBC's knowledge, this tandem signaling service has not been ordered from any LEC to date.

[45] Without such Commission rules, ILECs will have no assurance that they will be able to recover any uneconomic costs. These costs are expected to be significant. As noted by Nortel, "there are significant costs involved in developing new interconnection or unbundling points, including research and development of capability, development and documentation of the interface standards, testing and deployment." Nortel, p. 6